JD(ATL)–7–12
Hamilton, AL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

NTN-BOWER CORPORATION

and **CASE 10–CA–38816**

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO CLC

Gregory Powell, Esq., for the General Counsel**.**
Roy G. Davis, Keith J. Braskich & Richard A. Russo, Esqs., for the Respondent**.**
Robert M. Weaver, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Birmingham, Alabama on May 10-11, 2011. The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO CLC ("the Union") filed the charge in this case on January 31, 2011 and the General Counsel issued the complaint on March 30, 2011.[1] The complaint alleges that the Respondent, NTN-Bower Corporation, violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union on December 31, 2010.[2] The complaint further alleges that the Respondent violated Section 8(a)(1) and (5) of the Act, on and after January 27, 2011, by denying the Union access to its facility.

[1] After the close of the hearing, Counsel for the General Counsel filed a motion to amend the complaint to conform the pleadings to the proof. By order dated June 2, 2011, I denied the motion. In his brief, counsel urges that I re-consider the motion and permit the amendment of the complaint to correct what he describes as a ministerial error. I will address this issue later in my decision.

[2] All dates are in 2010 unless otherwise indicated.

The Respondent filed its answer to the complaint on April 13, 2011, admitting that it withdrew recognition from the union and that it denied Union representatives access to its facility, but denying that it committed any unfair labor practice by this conduct. By affirmative defense, the Respondent argues that its conduct was privileged by the fact that the Union lost the support of a majority of employees in the unit, as evidenced by a decertification petition presented to the Respondent's representatives on December 17.

In a prior proceeding, the Respondent was found to have committed approximately 19 unfair labor practices in violation of Sections 8(a)(1), (3) and (5) of the Act. *NTN-Bower Corporation,* 356 NLRB No. 141 (April 20, 2011). The unfair labor practices followed an economic strike engaged in by unit employees from July 2007 to July 2008. The parties stipulated at the hearing in this case that these unfair labor practices remained unremedied at the time the Respondent withdrew recognition from the Union. Thus, the primary issue in this case is whether those unremedied unfair labor practices tainted any loss of majority support suffered by the Union. *Penn Tank Lines, Inc.,* 336 NLRB 1066, 1067-1068 (2001); *Master Slack Corporation,* 271 NLRB 78, 84 (1984).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures tapered roller bearings at its facility in Hamilton, Alabama, where it annually sells and ships products valued in excess of $50,000 directly to customers located outside the State of Alabama. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Evidence

The roller and ball bearings manufactured at the Respondent's Hamilton plant are used in the heavy truck and industrial equipment industry. Among the Respondent's customers are Caterpillar and John Deere. The Respondent's production and maintenance employees at Hamilton have been represented by the Union for a number of years. A certification of representative in evidence shows that the Union was certified as the Section 9(a)

representative of these employees on August 5, 1976.[3] The Respondent also has a facility in Macomb, Illinois where the employees are unrepresented.

The strike described above occurred during negotiations for a collective bargaining agreement to succeed the parties' 2001-2006 contract. The negotiations commenced in February 2006, and continued on and off until July 2008. There is no dispute that, during the strike, the Respondent unilaterally implemented its "last, best and final offer" on December 31, 2007. The strike ended on July 23, 2008 when the Union made its unconditional offer to return to work under the unilaterally implemented contract. Although the collective bargaining agreement, on its face, states that it was effective from December 31, 2007 through December 28, 2012, it was not signed by the parties until July 23, 2008. Because the strike was still going on when the Respondent implemented the contract's terms, there was no union presence in the plant to administer or enforce the agreement, or otherwise represent the unit employees for the first six or seven months of the "contract."

The evidence at the hearing indicated that, of 219 employees who went out on strike in July 2007, only 24 or 25 have been recalled since the strike ended in July 2008. The rest had been replaced during the strike. One of the unremedied unfair labor practices from the prior case involved the Respondent's failure to reinstate an unknown number of strikers who had not been permanently replaced. Stacy Sinele, the Respondent's General Manager of Human Resources, testified that there were 21 temporary employees working in the plant when the strike ended and that they continued to work until April 2009. Sinele testified that all temporary employees were terminated as of April 2009 and that the Respondent hired no new temporary employees after April 2009. In the prior proceeding, the General Counsel and Charging Party, respectively, argued that either 29 or 26 temporary employees were working in unit positions between the end of the strike and April 2009. This evidence suggests that no more than 29 unreinstated strikers were entitled to reinstatement at the time the Respondent withdrew recognition from the Union.

The prior unfair labor practice case was heard by Administrative Law Judge John West in June and July 2009. Judge West issued his decision on May 10, 2010. As previously noted, Judge West found that the Respondent committed 19 separate unfair labor practices between July 23, 2008 and March 2009. The unfair labor practices, set forth at pages 126-127 of his decision are:

> By engaging in the following conduct, [the Respondent] has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.
>
> (a) Threatening its employees, who were former strikers, with the loss of their reinstatement rights if they failed to sign Respondent's Return To Work Log.

[3] There is no dispute that the appropriate unit for bargaining consists of:

> All production and maintenance employees employed at the Hamilton, Alabama plant, excluding all temporaries, office clerical employees, plant clerical employees, technical employees, quality control technicians, laboratory technicians, professional employees, guards, watchmen, and supervisors as defined by the Act.

(b) Orally promulgating a rule denying employee union representatives access to the Company bulletin board.

(c) Engaging in surveillance of Union activities, by monitoring the movements of employee Union representatives in and around its facility on or about the following dates: November 17 and 24, 2008, and on December 1 and 10, 2008.

By engaging in the following conduct, [the Respondent] violated Section 8(a)(1) and (3) of the Act.

(a) Requiring employees who were former strikers, as a condition of exercising their reinstatement rights, to sign Respondent's Return To Work Log.

(b) Failing and refusing to offer reinstatement or to reinstate employees who were former strikers to their former or substantially equivalent positions of employment, where those positions have not been filled with permanent replacement employees.

By engaging in the following conduct, [the Respondent] violated Section 8(a)(1) and (5) of the Act.

(a) Verbally implementing a rule requiring all former strikers to sign Respondent's Return To Work log.

(b) Unilaterally, and in the absence of a good faith bargaining impasse in negotiations, enforcing a rule requiring all former strikers to sign Respondent's Return To Work Log as a condition of returning to work.

(c) Unilaterally, and in the absence of a good faith bargaining impasse in negotiations, implemented the following changes with respect to subjects which relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects of collective bargaining:

On or about November 13, 2008, relocating the Union's office at the facility.

On or about November 17, 2008, establishing rules that impede employees' access to Union representatives.

On or about November 17, 2008, orally promulgating a rule restricting employee Union representatives' access to the employee break room.

On or about November 28, 2008, denying Union representatives access to the facility.

Beginning on or about March 6, 2009, and continuing thereafter, modifying the work week of the employees in the Unit.

(d) Failing and refusing to furnish the union with the addresses of permanent replacement employees on or after August 22, 2008 (30 days after the strike ended).

(e) Failing and refusing to furnish the Union with the information the Union requested regarding an October 22, 2007 picket line confrontation, including names of the individuals involved, videos/audio tapes, and any disciplinary action proposed or taken (and the basis for such action) regarding the non-striking employee/replacement worker involved in the incident.

(f) Failing and refusing to furnish the Union with the employment applications of permanent replacement employees on or after August 22, 2008 (30 days after the strike ended).

(g) Failing and refusing to furnish the Union with the information specified in the Union's August 14, 2008 letter, including, but not limited to, the 2007 annual form 5500, the 2007 actuarial report, and any amendments to the involved pension plan.

(h) Failing and refusing to furnish the Union with certain information, including, inter alia, documents, communications, letters, and notes regarding Respondent's decision to

modify its work week during March 2009.

(i) Failing and refusing to furnish the union with documents regarding the employment history of each employee in the bargaining unit at Respondent's Hamilton facility.

NTN-Bower Corporation, 356 NLRB supra, slip op. at pp. 126-127.

On April 20, 2011, the Board, after considering exceptions filed by the Respondent, affirmed Judge West's findings and conclusions, including all of the above unfair labor practice findings, and adopted his recommended Order, as modified to comply with the electronic notice posting requirements adopted by the Board in *J. Picini Flooring*, 356 NLRB No. 9 (2010). The Board's Order required the Respondent to, inter alia, offer reinstatement to any former strikers who have been denied reinstatement as a result of the Respondent's failure to return striking employees to work after the strike and make them whole for any lost wages and benefits; rescind unilaterally implemented changes including the changes affecting the Union's access to unit employees; and furnish the Union with the addresses of permanent replacement employees. 356 NLRB supra, slip op. at pp 1 and 129. As previously noted, Respondent stipulated that none of these unfair labor practices have been remedied.[4]

Ivan Caudle, the Union's recording secretary, testified that the number of employees in the unit declined from about 220 employees before the strike to somewhere between 150-160 after the strike. One factor in the decline was the Respondent's decision to outsource the maintenance department, which was implemented during the strike. Caudle further testified that none of the local union's officers were recalled to work after the strike. One of the recalled employees, Gary Childress, became an officer after the strike. The Union has had no stewards in the plant since the strike ended because, according to Caudle, none of the reinstated union members wanted to serve in these positions. Caudle testified that the union no longer has an office on the shop floor, as a result of the unilateral change found in the prior case. The office is now located in the office area where management offices are located. Employees wishing to visit the office must pass the Human Resources and Plant Manager's offices. In addition, because none of the union officers were reinstated after the strike, its office in the new location is no longer staffed full-time. According to Caudle, the office is only staffed on Monday, Wednesday and Friday from 2-4 pm. Caudle testified that up until the withdrawal of recognition, the Respondent continued to deny the union access to bulletin boards in the plant and restricted non-working union representatives access to the plant.

Sinele, the Human Resources Manager, testified that, on December 17, while working in her office at the Macomb plant, she received by fax the decertification petition that was ultimately relied upon by the Respondent to withdraw recognition. The petition had been faxed to her by unit employee Ginger Estes, who had been hired during the strike. The petition consisted of eleven pages of signatures. The following statement appeared at the top of each page:[5]

[4] By the close of the hearing, the Board's order had not yet been appealed or enforced by a court of appeals.

[5] The wording on one page, "We do not want union representation", is not substantively different from the others.

NTN Bower Employees:
We do not want the Union as our representative

Each signature is dated. The earliest signatures are dated September 14 and the latest is dated October 4. There were a total of 107 signatures on the eleven-page petition. Estes testified as a witness for the Respondent. She did not go into any detail regarding her efforts to obtain the signatures on the petition but she did testify that she learned how to decertify the Union by contacting the NLRB office. There is no evidence in the record, nor any contention by the General Counsel or the Charging Party, that the Respondent was involved in the circulation of this petition.

Sinele testified further that, upon receipt of the petition, she e-mailed a copy of it to Richard Barber, a certified public accountant whose firm has been retained by the Respondent since 1995 to audit its financial records and prepare tax returns. The Respondent hired Barber to authenticate the signatures on the decertification petition by comparing the signatures on the petition with company documents to determine whether the individuals who signed were in fact employed in the unit, and whether the signatures were valid. Sinele sent Barber a list of 153 active and laid off unit employees, which she compiled from the existing seniority list, and copies of W-4 forms for each employee on this list. If Barber was unable to determine authenticity of any signature from the W-4, Sinele sent him additional documents from the employees' personnel files containing the employee's signatures. Barber testified that he and two associates performed this task between December 22 and 24. Upon conclusion of the audit, he prepared a report which, although dated December 24, was not sent to Sinele until December 28.

Barber testified that, of the 107 signatures on the petition, two were duplicates and three could not be verified, leaving 102 signatures that he determined were valid. Barber acknowledged, on cross-examination, that neither he, nor the two associates who worked with him on this project, had any special training or expertise in handwriting analysis. Barber also acknowledged that he did not independently verify that the employees on the list of unit employees submitted to him by Sinele were in fact employed in the bargaining unit when they signed the petition, nor did he make any determination whether they were temporary or permanent employees.

Sinele testified that, upon receipt of Barber's report, she did her own handwriting analysis with respect to the three signatures that Barber had been unable to authenticate. Although admittedly no handwriting expert, she determined that these three signatures were also valid. According to Sinele, she reached the conclusion, after reviewing Barber's report and performing her own comparison of signatures, that 105 unit employees had signed the petition out of a total of 153 unit employees. Based on this determination, Sinele sent the December 31 letter to Harvey Durham, the union's servicing representative, informing him that, effective January 1, 2011, the Respondent would no longer recognize the union. Sinele admitted that she did not separately notify any official of the local union that the Respondent was withdrawing recognition.

Counsel for the General Counsel and counsel for the Charging Party had an opportunity to cross-examine Sinele, Barber and Estes regarding the authenticity of the signatures on the petition. In addition, the W-4 forms and other documents relied upon by Barber and Sinele to authenticate these signatures were placed in evidence. Neither General Counsel nor the Charging Party has attacked the validity of these signatures, nor offered evidence to contradict the testimony that the petition is what it purports to be, i.e. a petition signed by at least 102 unit employees on various dates between September 14 and October 4.[6]

At the hearing, the Respondent called twelve employees who had signed the petition to testify regarding their reasons for doing so. All but one were permanent replacements hired during the strike and each of them testified that they did not want the Union to represent them because of the way they were treated during the strike while crossing the Union's picket line. One witness, who has been employed by the Respondent for about 37 years and returned to work before the strike ended, testified that she was unhappy with the Union even before the strike. According to this witness, she never felt like she needed the Union to represent her. On cross-examination, the witnesses hired during the strike were unable to identify any union officers, had not seen the collective bargaining agreement negotiated by the Respondent and the Union, and generally acknowledged knowing very little about the Union.

In addition to the testimony of these witnesses, the Respondent made an offer of proof, which I rejected, that if called to testify, each of the employees who signed the petition would testify in similar fashion, i.e. that it was conduct by the Union, not any of the Respondent's unfair labor practices, which caused them to sign the petition.[7] Finally, in its post-hearing brief, the Respondent cited testimony of non-striking employees at the prior unfair labor practice hearing before Judge West, regarding incidents of misconduct on the picket line, and portions of Judge West's decision referring to this testimony as a reasonable basis for the Respondent having refused to provide the Union with the names and addresses of replacement

[6] Ms. Estes filed a decertification petition with the Board on October 8, submitting the petition at issue here as her showing of support (10-RD-1504). On October 25, the Board's regional director administratively dismissed the petition, based on the unremedied unfair labor practice found by Judge West. The Petitioner and the Respondent requested review of this decision and the board remanded the case on February 23, 2011 with instructions to apply *Master Slack,* supra, to determine whether there was a causal relationship between the unremedied unfair labor practices and employee disaffection. On March 9, 2011, the Regional Director issued his Decision and Order on remand, again dismissing the petition after finding such a causal connection existed. On May 20, 2011, after the close of the hearing, the Board denied the Respondent's request for review and affirmed the dismissal of the decertification petition. The General Counsel and Charging Party jointly requested, over the Respondent's objections, that I re-open the record to take official notice of the Board's Order. I find it appropriate in this case to take official notice of the Board's action in a related case.

[7] The Respondent also made an offer of proof that the Union, by filing grievances claiming discriminatory application of attendance rules, sought the termination of permanent replacements and that this also caused employee disaffection. I also rejected this offer of proof.

employees during the strike.[8] None of the picket line conduct attributed to the Union has been found to constitute an unfair labor practice.

B. Analysis

1. *General Counsel's Motion to Amend Complaint*

The complaint alleged, at paragraph 8, that the most recent collective bargaining agreement was effective from July 23, 2008 until December 28, 2012. At the hearing, after a discussion regarding the applicability of the Board's decision in *Shaw's Supermarkets, Inc.,* 350 NLRB 585 (2007)[9], General Counsel was asked if he wished to amend the complaint at that time. Counsel for the General Counsel declined to do so. Only after the hearing did the General Counsel, under the guise of conforming the pleadings to the proof, move to amend the complaint to allege that the collective bargaining agreement was effective from December 31, 2007 until December 28, 2012.While the Respondent did not object to this motion, the Charging Party did. I denied the request on the basis that the "proof" regarding the effective dates of the contract was in dispute and that General Counsel had waited too long to amend the complaint.

As noted above, Counsel for the General Counsel renewed his request to amend the complaint in his brief, now contending that the intent of the amendment was to correct a ministerial error. The charging Party did not file a brief and did not otherwise object to General counsel's motion for reconsideration of my ruling. Having considered the matter, and mindful of the General Counsel's express disavowal of any theory of liability based on *Shaw's Supermarkets*, supra, I shall grant the motion to amend the complaint as requested by General Counsel.

Although I have granted the General Counsel's motion and must decide this case solely on the theory posited by the General Counsel, it appears that the policy underlying the Board's decision in *Shaw's Supermarkets*, supra, would provide an alternative basis for finding a violation here. The contract in that case, like the one here, exceeded three years in duration. Under the holding in that case, the Respondent could withdraw recognition based on proof of the Union's actual loss of majority support after three years under the contract. The Board's rationale in reaching this conclusion in *Shaw's Supermarkets* was to promote the Act's dual goals of stability in labor relations and employee freedom of choice. The Board was clear that the showing of loss of support would only be effective after the unit employees have had the "benefit of 3 years of undisturbed experience with the Union as their representative." 350 NLRB, supra at 587. In this case, although the contract, on its face, was "effective" from December 31, 2007 and the Respondent did not withdraw recognition until

[8] As noted above, Judge West and the Board did find that the refusal to furnish this information, beginning 30 days after the strike, was unlawful. Because this unfair labor practice remained unremedied, the Respondent never provided this information to the Union.

[9] In *Shaw's*, the Board held that an employer could rely upon evidence of actual loss of majority support to withdraw recognition from a union after the third year of a contract of longer duration.

December 31, 2010, three years later, there is no dispute that there was no "contract", in the sense of a mutual agreement between the parties, until July 28, 2008. In addition, because there was no union presence in the plant until the strike ended, the employees had not had the benefit of a full three years of representation at the time the Respondent withdrew recognition. The Board's decision in *Spectrum Health-Kent Community Campus,* 353 NLRB 996 (2009), reaffirmed in 355 NLRB No. 101 (2010) is instructive. Similar to the facts here, the collective bargaining agreement on its face indicated it was effective from January 1, 2005 through March 31, 2008, but it was not signed by the parties until April 12, 2005. Although specific provisions in the contract were expressly made retroactive to January 1, 2005, the intent of the parties was ambiguous as to the effective date of the contract. The administrative law judge in that case, affirmed by the Board, found that the parties did not intend the contract to be effective until April 12, 2005. Based on this finding, that employer's withdrawal of recognition on January 7, 2008 was found to be unlawful.

The General Counsel here contends that this case is distinguishable from *Spectrum Health-Kent Community Campus,* supra, because the parties' intent in this case was that the contract be effective from the December 31, 2007 date of unilateral implementation. Unfortunately, because of the General Counsel's narrow theory of a violation in this case, that factual issue was not fully and fairly litigated. Nevertheless, despite my belief that the Respondent's withdrawal of recognition here was premature, I am constrained by the General Counsel's decision not to pursue this issue and shall consider only the theory advanced in the complaint, as amended.

2. *Was the Respondent's Withdrawal of Recognition Tainted By Its Unremedied Unfair Labor Practices*

As noted above, the General Counsel's theory of the case is limited to the contention that the Respondent's December 31, 2010 withdrawal of recognition from the Union was unlawful because of the Respondent's unremedied unfair labor practices from the prior case. All parties agree that the Board's decision in *Master Slack,* supra, is the controlling authority here. In that case, the Board held that an employer cannot avoid its duty to bargain with a union by relying upon any loss of majority that is attributable to its own unfair labor practices. However, not every unfair labor practice will taint a withdrawal of recognition. Rather, the Board requires that the General Counsel prove a causal relationship between the unremedied unfair labor practices and the loss of majority support. Where there has been a general refusal to bargain with an incumbent union, the Board presumes a causal relationship exists. *Lee Lumber & Bldg. Material Corp.,* 322 NLRB 175, 178 (1996), enfd. in rel. part and remanded, 117 F.3d 1454 (D.C. Cir. 1997), decision on remand 334 NLRB 399 (2001). In all other cases, the Board has identified several factors that are relevant in determining the existence of a causal relationship: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employee's morale, organizational activities, and membership in the union. *Penn Tank Lines, Inc.,* 336 NLRB 1066, 1067 (2001), citing *Master Slack,* 271 NLRB, supra at 84. Both the General Counsel and the Respondent agree that this is an objective test, i.e. whether the unfair labor practice

would have a reasonable tendency to cause employee disaffection.

As an initial matter, I find that the petition submitted to Sinele on December 17 was signed by a majority of the employees in the unit. In reaching this conclusion, I rely upon the uncontradicted testimony of the accountant, Barber, that the petition contained 102 valid signatures and the documents showing that those 102 employees were employed in the unit at the time of the petition. Based on the testimony of Sinele, and Union official Caudle, I find that, on December 17, there were no more that 183 employees in the unit, including up to 29 strikers who had not yet been reinstated because of the Respondent's unlawful failure to reinstate strikers whose positions had not been filled by permanent replacements, as found by Judge West and the Board in the prior case. Notwithstanding my concerns that the Respondent's withdrawal of recognition was premature under the Board's *Shaw's Supermarkets* decision, I am constrained to find, based on the General Counsel's limited theory of a violation, that the withdrawal of recognition here occurred at a time when the Union enjoyed only a rebuttable presumption of majority support. Based on these findings, I would conclude that the withdrawal of recognition was lawful unless the unremedied unfair labor practices from the prior case are found to have tainted the loss of majority support under *Master Slack,* supra, and its progeny.

After considering the factors set forth in *Master Slack,* supra, and followed by the Board in a multitude of cases since then, I find that the General Counsel has met his burden of proving that the Respondent's unremedied unfair labor practices tainted the petition here. Although the last unfair labor practices found by Judge West occurred in March 2009, and most of the other unfair labor practices occurred between July and November 2008, a considerable period of time before employees signed the decertification petition, the Board has relied upon seemingly remote in time unfair labor practices to find taint where the nature of the violations would tend to have a lasting detrimental effect on employees' view of the Union. *Tenneco Automotive, Inc.,* 357 NLRB No. 84 (August 26, 2011) and cases cited therein. Similar to the facts in *Tenneco,* the Respondent's unremedied refusal to furnish the Union with the names and addresses of permanent replacements "severely impacted the Union's ability to communicate with a substantial number of employees" during the almost 2½ years since the strike ended. Also, in much the same manner as that case, the Respondent's unremedied unilateral changes affecting the Union's ability to post on company bulletin boards and to interact with employees in the plant, and the relocation of the Union's office from the shop floor to management offices, combined with the refusal to furnish names and addresses of unit employees, limited the Union's ability to contact permanent replacements and deprived the Union of the opportunity to "meaningfully address any lingering feelings of disconnect that would naturally exist in the aftermath of a contentious and divisive strike." *Tenneco Automotive, Inc.* supra, slip op. at p. 7. Here, in particular, where only a small minority of strikers, and no union officers, were reinstated after the strike, the Union's inability to communicate with replacements effectively prevented it from establishing a relationship with those employees in an effort to demonstrate what it could do as their collective bargaining representative. Such unfair labor practices, by which an employer interjects itself between the Union and the employees it is supposed to represent, have a natural tendency to cause employee disaffection and loss of support for the Union. *Tenneco Automotive, Inc.,* supra, citing *Bridgestone/Firestone, Inc.,* 332 NLRB 575, 577

(2000), enfd. in rel. part sub nom. *Allied Industrial Employees, Teamsters Local 481 v. NLRB,* 47 Fed. Appx. 449 (9th Cir. 2002). In addition, the Respondent's unremedied failure to reinstate all strikers who were entitled to reinstatement at the conclusion of the strike, regardless of the number of employees denied reinstatement, would have a lingering and detrimental effect on unit employees by demonstrating the Respondent's power to adversely affect employees who exercise their statutory right to support the Union by participating in a strike. When considered individually and together, these unfair labor practices satisfy the first three factors considered by the Board (timing, nature of violations and tendency to cause employee disaffection).

The evidence in this case also satisfies the fourth factor, i.e. the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. The testimony of Ivan Caudle, the Union recording secretary, established the decline in membership and attendance at union meetings since the strike. He also testified regarding the difficulty of finding employees to serve as stewards in the plant because so few strikers were returned to work. His testimony regarding the impact of the Respondent's relocation of the union's office and other measures affecting access to employees also demonstrated the negative impact of the unremedied unfair labor practices on the Union's organizational activities. This testimony was supported by the testimony of those employees called by the Respondent, most of whom had no knowledge of the union or its representatives or of their rights under the collective bargaining agreement. Having satisfied all four factors considered in determining the existence of a causal relationship between the unfair labor practices and the loss of support, I conclude that General Counsel has met his burden of proof in this case.

Although the standard for determining whether the General Counsel has met his burden of proving a causal connection is an objective one, the Board has, on occasion, allowed an employer to offer subjective testimony from employees indicating that their disaffection from the Union was unrelated to the unremedied unfair labor practices. That is the evidence the Respondent relies upon here to prove that it did not violate the Act by withdrawing recognition. As noted above, most of this testimony showed that the employees were unhappy with the Union due to conduct attributed to the union during the 2007-2008 strike. Such conduct was even more remote in time from the withdrawal of recognition than the Respondent's unremedied unfair labor practices, which all occurred after the strike ended in July 2008. In addition, as noted by the Board in *Tenneco Automotive, Inc.,* supra, it is precisely because of such lingering bad feelings that the Union needs to have the ability to communicate and interact with the replacements after the strike to address their concerns and to attempt to organize these employees by demonstrating the benefits of continued representation. As the Board stated:

> We recognize that a lack of union support may be attributed to the particular circumstances, i.e. that some of the unit employees were hired as permanent replacements and others had crossed the picket line and returned to work before the strike ended. However, these factors do not outweigh the fact that the Respondent's unlawful conduct hindered the Union's ability to engage in organizational and representational activities, and thereby make its case to these employees for continuing its representation. At a minimum, it deprived employees

> of an atmosphere where they could meaningfully and freely consider whether they desired to continue being represented by the Union.

357 NLRB supra, slip op. at p. 8.

In a recent case, the Board held that the subjective testimony of petition-signers regarding their motive in signing the petition is irrelevant to a consideration whether unremedied unfair labor practices caused a loss of majority support for the Union. *Comau, Inc.,* 357 NLRB No. 185, slip op. at p. 6 (January 3, 2012) and cases cited therein. Moreover, the Board found that even were it to consider the subjective testimony, it would reach the same conclusion (that the unfair labor practices tainted the petition) because the employees' subjective testimony was consistent with the Board's finding that the disaffection was causally related to the employer's unlawful conduct. As the Board noted, it has never held that, in order for a nexus to be established under the *Master Slack* test, the employer's unfair labor practices must be the *only* factors causing disaffection. 357 NLRB No. 185, supra, slip op. at p. 7.

Accordingly, based on the above, I find that the Respondent's unremedied unfair labor practices found by the Board at 356 NLRB No. 141 had a reasonable and natural tendency to cause employee disaffection and that the petition purporting to show the actual loss of majority support for the union was tainted by these unfair labor practices. I therefore conclude that the Respondent's December 31, 2010 withdrawal of recognition from the Union violated Section (8)(a) (1) and (5) of the Act as alleged in the complaint.

3. *The Respondent's Denial of Access to the Union*

There is no dispute that, on January 27, 2011, after the Respondent had withdrawn recognition, Caudle and Terry Pearce, the local union's vice president, went to the facility to conduct a monthly safety inspection in accordance with Article XI, Section 2 of the collective bargaining agreement. They were met by Gary Franks, the Respondent's Human Resources Manager, who informed them that the safety tour had been cancelled because the Respondent no longer recognized the Union. According to Caudle, Franks told him and Pearce not to return to the plant unless the Respondent requested them to do so. Franks did not dispute this testimony.

Because I have found that the Respondent's withdrawal of recognition was unlawful, it follows that the Respondent's denial of access to the Union for purposes of conducting contractually required safety inspections and tours was unlawful. The Respondent cited no other reason for preventing the Union from carrying out its representational duties on that date or later. The Respondent did not even address this allegation in its brief. Accordingly, I find that the Respondent's conduct on and after January 27, 2011 violated Section 8(a)(1) and (5) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. By withdrawing recognition from the Union on December 27, 2010, the Respondent

has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By denying the Union access to its facility for the purpose of representing unit employees since January 27, 2011, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Respondent be ordered to recognize the Union as the exclusive collective bargaining representative of its unit employees and, upon request, bargain in good faith with the Union regarding the employees' wages, hours, and terms and conditions of employment. See *Caterair International*, 322 NLRB 64 (1996).[10] The reasons advanced by the Board in *Tenneco Automotive, Inc.,* supra, for imposing an affirmative bargaining obligation are equally applicable here. I shall also recommend that the Respondent permit the Union access to its facility to conduct monthly safety inspections and meetings and to otherwise perform its statutory representative functions. Finally, I shall recommend that the attached notice to employees be distributed electronically if, at the compliance stage, it is determined that the Respondent utilizes that means of communicating with its employees. *J. Picini Flooring,* 356 NLRB No. 9, slip op. at 3-4 (October 22, 2010).

In addition to the traditional remedies ordered in a case involving the unlawful withdrawal of recognition, the General Counsel has requested several additional remedies in light of "the number, the egregious nature, cumulative effect, and the extent of the Respondent's unfair labor practices." In seeking such remedies, the General Counsel relies upon not only the unfair labor practices found here, but the prior unfair labor practices found by Judge West and the Board. General Counsel argues that these unfair labor practices have resulted in employee disaffection; negatively impacted employee morale; eroded employee confidence in the Union; and impeded the Union's organizational efforts and activities. Specifically, the General Counsel requests that (1) either a responsible management official, or a Board agent, read the Notice to Employees; (2) that the Union be allowed reasonable access to its bulletin boards and all places where notices are customarily posted; (3) that a copy of the Notice be mailed to all unit employees, including unit members who have not been recalled to work since July 23, 2008; and (4) that the Respondent furnish the Union with the names and addresses of its current bargaining unit employees. The Respondent, in its brief, did not address the General Counsel's request for special remedies.

[10] The collective bargaining agreement signed by the parties on July 23, 2008 is effective through December 28, 2012. The affirmative bargaining order would become effective for purposes of negotiating a new agreement should a final order in this case issue after the collective bargaining agreement has expired.

Although I agree with the General Counsel that the unfair labor practices found in the prior case are pervasive and have had a lingering deleterious effect on the Union's continuing support among unit employees, the Board has already issued an Order in that case requiring that the Respondent remedy these unfair labor practices. The order I am recommending here, that requires the Respondent to recognize the Union and permit it access to the facility to represent the employees, together with the Respondent's compliance with the order in the prior case, should provide many of the benefits sought by the special remedies General Counsel is seeking here. For example, under the Board's prior order, the Respondent will be required to furnish the Union with the names and addresses of the replacement employees, to rescind the unilateral changes affecting the Union's access to unit employees and the use of bulletin boards, and to reinstate those strikers who were unlawfully denied reinstatement on and after July 23, 2008. The Union, as the collective bargaining representative of the unit, can request updated contact information for all unit employees on its own. Thus, I do not find it necessary in this case to grant the special remedies requested by the General Counsel.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, NTN-Bower Corporation, Hamilton, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from the International Union, United Automobile, Aerospace & Agricultural Implement workers of America, AFL-CIO CLC and its Local 1990 (the Union).

(b) Denying the Union access to the Respondent's Hamilton, Alabama facility for the purpose of participating in safety and health inspections for the purposes set forth in the parties' collective bargaining agreement, and for the purpose of representing the bargaining unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the Union as the exclusive collective bargaining representative of the appropriate bargaining unit described below, reinstate the December 31, 2007 through

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

December 28, 2012 collective bargaining agreement without retracting any benefit conferred on unit employees, and bargain collectively with the Union as the exclusive collective bargaining representative of the employees in the following unit:

> All production and maintenance employees, excluding all temporaries, office clerical employees, plant clerical employees, technical employees, quality control technicians, laboratory technicians, professional employees, guards, watchmen, and supervisors as defined in the Act.

(b) Upon request, grant the Union and its representatives access to the Hamilton, Alabama facility for the purpose of conducting safety and health inspections pursuant to the collective bargaining agreement and for the purpose of representing the bargaining unit employees with respect to their wages, hours, and other terms and conditions of employment.

(c) Within 14 days after service by the Region, post at its facility in Hamilton, Alabama copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 31, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., February 15, 2012.

_____
Michael A. Marcionese
Administrative Law Judge

12 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from, and fail and refuse to bargain with, the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO CLC and its Local 1990 (the Union) as the exclusive collective bargaining representative of our unit employees.

WE WILL NOT deny the Union access to our Hamilton, Alabama facility for the purpose of participating in safety and health inspections under the terms of our collective bargaining agreement with the Union, and for the purpose of representing our bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective bargaining representative of our employees in the following appropriate unit:

All production and maintenance employees, excluding all temporaries, office clerical employees, plant clerical employees, technical employees, quality control technicians, laboratory technicians, professional employees, guards, watchmen, and supervisors as defined in the Act.

WE WILL reinstate the December 31, 2007 through December 28, 2012 collective bargaining agreement that was in effect when we unlawfully withdrew recognition from the union.

WE WILL, upon request, grant the Union and its representatives access to the Hamilton, Alabama facility for the purpose of conducting safety and health inspections pursuant to the

collective bargaining agreement and for the purpose of representing the bargaining unit employees with respect to their wages, hours and other terms and conditions of employment.

NTN-BOWER CORPORATION

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

233 Peachtree Street N.E., Harris Tower, Suite 1000, Atlanta, GA 30303-1531
(404) 331-2896, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (404) 331-2870.